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EXAMINER

AVELLINO, JOSEPH E

ART UNIT	PAPER NUMBER
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2143

MAIL DATE	DELIVERY MODE
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06/27/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

09/872,329

Applicant(s)

BERG, MITCHELL T.

Examiner

Joseph E. Avellino

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 30 May 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-67 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-67 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>5/30/07</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. Claims 1-67 are presented for examination with claims 1, 18, 42, 46, and 49 independent. The Office acknowledges the addition of claims 53-67; claims 54, and 57 independent.

Double Patenting

2. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 6-10, 16-26, 29-67 of Application no. 09/872,332 contains every element of claims 1-67 of the instant application and as such anticipates claims 1-67 of the instant application.

3. "A later patent claim is not patentably distinct from an earlier patent claim if the later claim is obvious over, or **anticipated by**, the earlier claim. *In re Longi*, 759 F.2d at

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896, 225 USPQ at 651 (affirming a holding of obviousness-type double patenting because the claims at issue were obvious over claims in four prior art patents); In re Berg, 140 F.3d at 1437, 46 USPQ2d at 1233 (Fed. Cir. 1998) (affirming a holding of obviousness-type double patenting where a patent application claim to a genus is anticipated by a patent claim to a species within that genus).” ELI LILLY AND COMPANY v BARR LABORATORIES, INC., United States Court of Appeals for the Federal Court, ON PETITION FOR REHEARING EN BANC (DECIDED: May 30, 2001).

Claim Rejections - 35 USC § 112

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claim 49 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

6. Referring to claim 49, the claim recites “outputs the request packet...without using IP-IP encapsulation” which is a negative limitation that renders the claim indefinite because it is an attempt to claim the invention by excluding what the inventors did not invent rather than distinctly and particularly pointing out what they did invent. *In re Schechter*, 205 F.2d 185, 98 USPQ 144 (CCPA 1953). See MPEP 2173.05 (i).
Correction is required.

Claim Rejections - 35 USC § 103

7. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-48, 50, and 53-67 are rejected under 35 U.S.C. 103(a) as being unpatentable over Aversa et al. (Load Balancing a Cluster of Web Servers Technical Report BUCS-TR-1999-01, Boston University, Computer Science Department, January, 1999) (cited by Applicant in IDS) (hereinafter Aversa) in view of Bruck et al. (USPN 6,801,949) (hereinafter Bruck).

8. Referring to claim 1, Aversa discloses an information processing system, comprising:

a first computing device (in the example given in the reference it is referred to as "Server 4") (Figure 2) for:

receiving an initialization packet (i.e. SYN) originating from a client (p. 5, ¶ 2-3);

in response to at least the initialization packet, outputting a response packet (i.e. ACK) to the client (it is an inherent feature of the system that an ACK is sent to the client in order to tell the client that the connection is opened, this is one of the building blocks of the HTTP protocol);

receiving a request packet originating from the client (p. 4, ¶ 2); and

in response to at least the request packet and a state of at least one of the first computing device and a second computing device, selectively outputting the request packet to the second computing device for performing an operation through a second network that is not the same as the first network (i.e. LAN versus Internet) transmit resource, Server 4 looks at its own load, and if it is above a threshold, it will examine the load of other servers, in the example, forwarding the connection to Server 2, which has a load below the threshold) (p. 4, ¶ 2).

Aversa does not specifically state receiving the initialization packet through a first port connected to a first network, and the client request is received through the first port and the output to the second network is connected to a second port. However, Aversa shows in Figure 2 a Local Network connecting Servers 1-5 and receiving a client request from Clients A-C routed through the Internet. Therefore one of ordinary skill in the art that there are two ports per server one connected (the Office takes the term “connected” as logically able to communicate via that port) to the first port (i.e. listening on the Internet) and another port connected to the Local Network (i.e. listening on the Local Network as shown by the “Forward” request to server 2 from server 4). Therefore, one of ordinary skill in the art would find it obvious to modify the teaching of Aversa to include a first port connected to a first network and a second port connected to a second network not the same as the first network, since it would reduce bottlenecking by not requiring one server to act as a router for all the other servers, effectively distributing the routing architecture over all of the servers as can be seen in Figures 1 and 2 of Aversa.

Aversa does not explicitly state that the first network is logically separate from the second network. In analogous art, Bruck discloses another information processing system which discloses a first network (i.e. external subnet) logically separate from a second network (i.e. internal subnet 1) which is also logically separate from a third network (i.e. internal subnet 2) (Figure 3; col. 8, lines 10-15). It would have been obvious to one of ordinary skill in the art to combine the teaching of Bruck with Aversa to provide three logically separate networks which carry three separate types of information in order to allow reconfiguration in response to machine problems and in response to variations in network traffic loading among the machines, such that the load of one network would not be a bottleneck for another network, thereby reducing congestion over the overall system as supported by Bruck (col. 8, lines 25-30).

9. Referring to claim 2, Aversa discloses the first computing device is a NIC (this is an inherent feature of Aversa, since the Server would be unable to communicate with the network if a NIC was not installed on the Server).

10. Referring to claim 3, Aversa discloses the second computing device is configured to perform an operation of a software application (i.e. a web server) (p. 5, ¶ 3).

11. Referring to claim 4, Aversa discloses the software application is a socket based application (the Office takes the term "socket based application" as any application

which either uses, controls, or interfaces with a socket, such as a web server) (p. 5, ¶ 3).

12. Referring to claim 5, Aversa discloses the initialization packet (i.e. SYN packet) is addressed by the client to the first computing device (i.e. Server 4), and wherein the first computing device is for receiving the initialization packet in response to the addressing (an inherent feature of HTTP is that a server always receives a packet to which it is addressed, barring any connection disruptions) (p. 4, ¶ 2).

13. Referring to claim 6, Aversa discloses outputting a response packet to the client and wherein the first computing device is for:

in response to at least the request packet and the state (i.e. server load), selectively outputting the request packet to the second computing device for outputting the response packet to the client, such that the output response packet bypasses the first computing device (i.e. Server 2, responds by sending the requested resource to the client using Server 4 as the source address) (p. 4, ¶ 2; p. 5, ¶ 3).

14. Referring to claim 7, Aversa discloses the first computing device is for receiving the initialization packet through a global computer network (i.e. Internet) (e.g. abstract).

15. Referring to claim 8, Aversa discloses the first computing device is for selectively outputting the request packet to the second computing device through a LAN (Figure 2).

16. Referring to claim 9, Aversa discloses in response to the at least the initialization packet, establishing a data structure of a connection with a client (i.e. an IP-IP encapsulation packet) (p. 4, ¶ 1); and

In response to at least the request packet and the state, selectively outputting the data structure to the second computing device for associating an application of the second computing device with the data structure of the connection (p. 4, ¶ 1).

17. Referring to claim 10, Aversa discloses in response to at least the initialization packet, establishing a data structure (IP-IP encapsulation packet) of a connection with the client, the data structure including a group of sequence numbers associated with the connection (it is well known that HTTP IP packets have several octets reserved for a sequence number, in order to reassemble the packets at the destination).

18. Claims 11 and 13 are rejected for similar reasons as stated above. Furthermore Aversa discloses bypassing the first computing device and appearing to the client as received from the first communicating device (i.e. Server 2 serves the request to client B using the IP address of Server 4 as the source address) (p. 3, ¶ 3).

19. Referring to claims 12 and 29, Aversa in view of Bruck discloses the invention substantively as described in claim 10. Aversa in view of Bruck does not specifically state the group of sequence numbers includes at least one start sequence number, at

least one current sequence number, and at least one ACK number. It is well known that HTTP provides for storing current sequence numbers and ACK numbers in order to determine which packets have been received and acknowledged to determine if the requested resource has been fully received. In regards to the start sequence number, it would make sense to track that number for encryption purposes (some encryption algorithms start their sequence numbers at random numbers to confuse any snooping algorithms which think they have missed the beginning part of the sequence). By this rationale it would have been obvious to one of ordinary skill in the art to track the start sequence number, the current sequence number, and the ACK number to keep track of all the packets incoming and outgoing from the computing device, thereby providing for a reliable transport protocol for web documents.

20. Referring to claims 14-16, Aversa discloses the address includes an IP address and a TCP port, (i.e. an IP address of the first computing device and port 80, which is the port of the TCP/IP stack) (p. 5, ¶ 7).

21. Referring to claims 17 and 34, Aversa discloses the invention substantively as described in claim 15. Aversa further discloses the port is a TCP port as seen in claim 16, however remains silent over if the port can be a UDP port. It is well known that web servers can exist using UDP ports, and some applications rely upon these ports (web conferencing, gameplay, blizzard.net, etc) in order to provide an almost real-time feel to the content. It would have been obvious to one of ordinary skill in the art to provide for

a UDP port to communicate the first computing device to a second computing device in order to rely upon the UDP protocol for a server, thereby increasing the abilities of the web servers and allowing more users access to the network.

22. Claims 18-28, 30-33 and 35-38 are rejected for similar reasons as stated above.

23. Referring to claim 39, Aversa discloses the invention substantively as described above. Aversa discloses a third network (i.e. LAN) to transmit synchronization information and coupled to each of the plurality of servers, wherein the first server of the plurality of servers is configured to selective redistribute through the second network a received client request to a second server in the plurality of servers based at least in part of the transmitted synchronization information (see rejections above).

24. Referring to claim 40, Aversa inherently discloses a router for transmitting a response to a received client request and coupled (i.e. able to communicate) to the second server in the plurality of servers (Avers discloses being coupled to the Internet which inherently has at least one router for facilitating responses to clients) (Figure 2).

25. Referring to claim 41, Aversa discloses the first network is coupled to each of the plurality of servers and each server can received a client request (Figure 2, see multiple requests coming from Client A to Server 2, Client C to Server 5, etc.).

26. Referring to claim 44, Aversa discloses the invention substantively as described in claim 42. Aversa does not specifically state the third packet is transmitted when network packet of the second type is received (Aversa discloses the synchronization information is transmitted "intermittently"). However one of ordinary skill would realize the benefits of transmitting the synchronization information when a packet has been received to ensure the updating of the load information for that particular server occurs when it is needed (i.e. when a new request arrives) and is reduced for when it is not needed (i.e. when a request does not come in for a period of time), thereby reducing overall traffic load on the network as well as reducing overall overhead processing of packets in the network.

27. Referring to claim 50, Aversa discloses the invention substantively as described in claim 49. Aversa does not specifically state sending a response packet by the first computer system such that the client thinks it came from the second computer system, however Aversa also states that the IP source addresses can be modified to include other servers as sending the response (see rejections above), and it is inherent that TCP packets receive ACK packets for sent packets, so therefore one of ordinary skill in the art would realize the benefits of having the client perceiving the response packet is received from the second computer system in order to remove the first computer system from repeatedly having to forward requests to the second computer system, thereby reducing the load on the first computer system (i.e. Server 4 still receives requests for Client B even though the request is being served by Server 2, however Server 4 still has

to process the packet, determine which server is handling this request, and then forward this packet, costing valuable processing time) (p. 3, ¶ 2).

28. Claims 53-67 are rejected for similar reasons as stated above. Furthermore Bruck discloses a third network which transmits synchronization information (i.e. note lateral lines between servers 230 indicate state sharing and unique protocol words are communicated between the machines) (col. 6, line 45 to col. 7, line 2). Bruck further discloses the ports are physically separate from one another (i.e. a NIC interface for each network internal and external to which the machine is connected) (col. 7, lines 65-67).

Claims 49, 51 and 52 is rejected under 35 U.S.C. 103(a) as being unpatentable over Aversa in view of Bruck in view of Joffe et al. (USPN 6,185,619) (hereinafter Joffe).

29. Referring to claim 51, Aversa in view of Bruck discloses the invention substantively as described in claim 49. Aversa in view of Bruck does not specifically disclose forwarding the packet to the first computer system without invoking services of the operating system. IN analogous art, Joffe discloses another information processing system which discloses disclose forwarding the packet to the first computer system without invoking services of the operating system (the selection is done by the Director daemon, not the Operating System of the server) (col. 11, lines 42-55). It would have been obvious to one of ordinary skill in the art to combine the teaching of Joffe with

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Aversa in order to select an appropriate server from which to retrieve a data object for a user based upon the user's request and the capabilities and topology of the underlying network as supported by Joffe (col. 3, lines 35-40).

30. Referring to claim 49 and 52, Aversa discloses the invention substantively as described in claim 49. Aversa does not specifically disclose not using IP-IP encapsulation and without using TCP splicing techniques in order to output the packet to the first computer system. IN analogous art, Joffe discloses another information processing system which discloses not using IP-IP encapsulation and without using TCP splicing techniques in order to output the packet to the first computer system (col. 12, lines 50-55). It would have been obvious to one of ordinary skill in the art to combine the teaching of Joffe with Aversa in order to select an appropriate server from which to retrieve a data object for a user based upon the user's request and the capabilities and topology of the underlying network as supported by Joffe (col. 3, lines 35-40).

Response to Arguments

31. Applicant's arguments dated June 23, 2006 have been fully considered but are not persuasive.

32. In the remarks, Applicant argues, in substance, that (1) The double patenting rejection should be withdrawn under MPEP 804 (I)(B)(1), (2) there is no motivation to

combine Aversa with Bruck, since Bruck uses distributed servers and backend servers, whereas Aversa utilizes redirection, (3) the Examiner appears to be relying on hindsight reasoning in order to combine the references.

33. As to point (1), Applicant is incorrect. Since the other copending application is ready for allowance, and eventually will become a patent, it is proper to maintain the rejection as if the copending application is treated as a patent. In this sense, section 804 (l)(B)(1) does not apply and the section treating a Patent and an Application should apply. By this rationale, the rejection is maintained.

34. As to point (2), Applicant is incorrect. Applicant must be aware that the servers of Bruck (i.e. the front end servers 200 and the back end servers 204) are inherently disclosed within the same server of Aversa. The front end servers distribute the requests to the back end servers which service the request (Bruck: col. 6, line 45 to col. 7, line 2). In this sense, when combined with Aversa, will allow the distributing part of the server the ability to route the request to a back end part of another server via the internal subnet, which is logically separate from the external subnet. By this rationale, the rejection is maintained.

35. As to point (3), as stated in the previous office action, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was

within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In this case, server bottlenecking is a well known malady of network architecture and one of ordinary skill in the art would recognize this problem of Aversa and would be motivated to remedy this problem via a second network such as the one of Bruck. Furthermore even though Applicant states that there are other means to distinguish between packets received from a client and rerouted packets, this does not explicitly teach away from using multiple networks since this distinction is not needed to remedy server congestion. By this rationale, the rejection is maintained.

36. Applicant reiterates numerous arguments for the other independent claims which are believed to be refuted by points (1)-(3). By this rationale, the rejection is maintained.

Conclusion

37. Applicant has failed to seasonably challenge the Examiner's assertions of well known subject matter in the previous Office action(s) pursuant to the requirements set forth under MPEP §2144.03. A "seasonable challenge" is an explicit demand for evidence set forth by Applicant in the next response. Accordingly, the claim limitations the Examiner considered as "well known" in the first Office action, are now established

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as admitted prior art of record for the course of the prosecution. See *In re Chevenard*, 139 F.2d 71, 60 USPQ 239 (CCPA 1943).

38. A notice of Allowance was mailed in the copending application '332 along with a statement of Reasons for Allowance. If similar limitations were provided in the independent claims commensurate with those Reasons and the allowed claims of the '332 application, the Examiner believes that would put this case into condition for allowance.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Joseph E. Avellino whose telephone number is (571) 272-3905. The examiner can normally be reached on Monday-Friday 7:00-4:00.

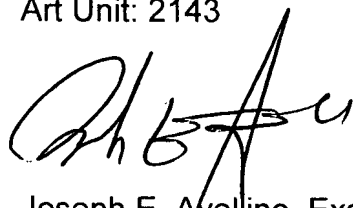
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David A. Wiley can be reached on (571) 272-3923. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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A handwritten signature in black ink, appearing to read 'J. E. Avellino', written over the printed name.

Joseph E. Avellino, Examiner

June 13, 2007